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In the Supreme Court of the United States

LAWRENCE E. WARNER AND GEORGE H. RYAN,
PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Brief in Opposition ("Opp.") demonstrates the compelling need for this Court to review the important questions presented arising out of the conviction of a State's governor for conduct relating to his official duties. Indeed, the opposition reveals the recurring confusion over the standards governing the removal and substitution of deliberating jurors and illustrates the significance of all three jury-related questions in light of the bedrock constitutional guarantees to a fair trial before an impartial and unanimous jury. It advocates views that are not only subject to express conflicts but that have enormous practical import for criminal trials throughout the Nation.

On the first question presented relating to the removal and substitution of jurors during deliberations, respondent concedes the circuit split on the standard governing the removal of a holdout juror. Respondent argues that the conflict is not implicated here because there was a legitimate basis for removal. But in taking that position, respondent has simply chosen one side over another in the recurring debate over the proper standard for removal. The question presented is whether a deliberating juror can properly be removed when there is an objective possibility that removal is sought based on the juror's view of the evidence, *or* — as respondent argues — is removal proper so long as there is any basis in the record? On substitution, respondent eschews a discussion of constitutional limitations, and the conflicting positions taken by the government in this very case demonstrate the confusion over the question.

With regard to the second question — the structural error stemming from the jurors' fears of prose-

cution — respondent seeks to avoid the merits by mistakenly claiming waiver on a question that petitioners have raised at every level of the court system. And that claim itself implicates the ongoing debate over whether a structural error can even be waived. On the substance, respondent fares no better because its opposition is predicated on speculative claims about a supposed absence of actual prejudice where the difficulty in assessing prejudice is itself a distinguishing trait of structural error.

On the third question, respondent, like the court below, defends a toothless standard of review by claiming that petitioners "abandoned" cumulative error. That claim, while mistaken, squarely implicates the split in authority discussed in the Petition: whether a reviewing court has an *independent* obligation to evaluate the cumulative effect of errors raised on appeal. And respondent's fallback position implicates another circuit split, namely, whether the finding of a single error precludes a cumulative error analysis.

In short, respondent's opposition casts no doubt on the need for this Court's review.

A. The Question Concerning The Constitutional Limits On The District Court's Power To Remove and Substitute Deliberating Jurors Is Squarely Presented, Is Subject To Conflicts In Authority, And Is Recurring And Important

The brief in opposition is noteworthy for what it does not address. From the opposition, a reader could not discern that the Seventh Circuit expressly held below that an inquiry into the prejudice to a defendant's constitutional rights to a fair trial before an

impartial jury stemming from a decision to remove and substitute deliberating jurors is required *only* when "a district court fails to comply with the non-discretionary requirements of [Rule 24]." App. 35a. Nor does the opposition acknowledge the Seventh Circuit's holding that "[t]he defendants have the burden of demonstrating on appeal that there was no legitimate basis in the record" for the decision to remove and substitute. App. 35a-36a.

Respondent's reluctance to address these points is obvious. The framework adopted by the court below, in which literal compliance with Rule 24 eliminates any constitutional objection to the decision to remove and substitute deliberating jurors, is incompatible with the constitutional guarantees to an impartial jury, unanimous verdict and fair trial. See U.S. Const. amends. V, VI. Respondent offers summary assurances that "[t]here was nothing wrong" or "improper," Opp. 9-10, but never addresses whether there are any constitutional limits in the wake of the 1999 amendment to Rule 24. The petition squarely presents that as an issue warranting this Court's review.[1]

The brief in opposition concedes a conflict on the standard governing the removal of a potential holdout juror. Opp. 11-12. However, respondent argues that this case does not implicate that circuit split because "Ezell's views were unknown to the litigants

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[1] Respondent half-heartedly suggests forfeiture because petitioners "did not object to dismissing Ezell, Pavlick, or Masri," but then concedes the point with a staggering qualification: "*other than as to the legal standard employed by the district court.*" Opp. 9 (emphasis added). The question presented plainly relates to the conflicting legal standards governing removal.

and court" at the time she was removed. Opp. 10. That contention is belied by the record. Ezell was removed after the district court and counsel had spent days struggling to respond to a series of notes from the jury in which Ezell complained of verbal abuse, Tr.24053, and another group of jurors sought Ezell's removal because — in their words — Ezell "disagrees with whatever is presented to her" and "only 11 of 12" are deliberating in good faith, Tr.24074-76. These notes revealed the jurors' split, and the lead prosecutor acknowledged that fact at the time in the presence of the court and counsel: "Ms. Ezell, I will say, whether she is for us or against us – *and obviously we saw the notes* . . ." Tr.24581-82 (emphasis added). Further, as Judge Kanne noted, "[t]he district judge left unresolved her consideration of the conflict between potential 'holdout' Juror Ezell and other jurors":

> Nowhere in the record does the district judge make a ruling as to whether a conflict existed between Juror Ezell and other jurors to determine if the jurors had deadlocked or if Juror Ezell was indeed a holdout. Nor did the court determine the impact that dismissing Juror Ezell would have on the other jurors in light of the conflict among the jury as expressed to the court in the jurors' notes, and whether this might give an indication to other jurors that the court was siding with the views of one group of jurors over another.

App. 86a (Kanne, J., dissenting).

The conflict over the removal standard is amply demonstrated. Here, the Seventh Circuit held that "it does not matter what the prosecution may have suspected about Ezell's views on the evidence," App. 31a, so long as *post hoc* there is some "legitimate basis in the record" to support removal, App. 36a. In stark contrast, other circuits have held that so fundamental are the rights to a fair trial and a unanimous verdict from an impartial jury that "if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987); accord *United States* v. *Thomas*, 116 F.3d 606, 622 (2d Cir. 1997) (same); *United States* v. *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999) (same). Respondent asserts that the "heightened standard" articulated in these cases is "not triggered" here because there was a legitimate basis for removal. Opp. 13. But that contention itself demonstrates the conflict: there is a world of difference between a system that permits removal of a deliberating juror *only* when there is no reasonable possibility that removal is sought based on the juror's view of the evidence, and the view that "it does not matter" why removal is sought provided there is some basis to justify removal after the fact.

Likewise, the confusion regarding the appropriate standard for substitution cannot be ignored — both before and after the amendment to Rule 24. Opp. 14. The earlier holdings analyzing substitution are rooted in constitutional doctrine. In *United States* v. *Register*, this led the Eleventh Circuit to state that in evaluating the substitution of deliberating jurors "the ultimate question we must decide is whether the re-

cord indicates *a reasonable possibility of prejudice to the defendants*." 182 F.3d 820, 843 (11th Cir. 1999) (emphasis added). Other circuits, by contrast, evaluated the substitution of deliberating jurors for *actual* prejudice. See, *e.g.*, *United States* v. *Josefik*, 753 F.2d 585, 587 (7th Cir. 1985). Here, post-amendment, the Seventh Circuit adopted yet another approach and refused *any* prejudice analysis absent an express rule violation. App. 34a. The government advocated below that substitution should be analyzed under an actual prejudice standard, Gov't Br. 46-50, but now respondent appears to take a different position in this Court, Opp. 14. Indeed, all this demonstrates real confusion on an important question. The *constitutional* concerns implicated by substituting jurors during deliberations — the inherent risk of compromising unanimity and group deliberation — are not altered by the 1999 amendment to Rule 24.

In citing more recent decisions related to removal and substitution, respondent has demonstrated the recurring nature of this issue. Opp. 11. Respondent has not argued that this is an unimportant question, in apparent recognition that it relates to a criminal defendant's most fundamental trial rights — the rights to a fair trial before an impartial and unanimous jury.

B. The Structural Error Question Whether Jurors Fearing Criminal Prosecution Can Be Impartial Is Squarely Presented And Is Important

Respondent does not dispute the importance of the second question presented, that is, whether deliberating jurors who have reason to fear criminal prosecution can be impartial.

1. Respondent suggests instead that petitioners did not preserve this structural error, but that suggestion is baseless. In fact, petitioners raised an objection before the district court, Tr.24692, 24698, and the court acknowledged the objection on the record: "The . . . argument you are making is that we now have a bunch of fearful jurors. I don't know how to address that." Tr.24699. On appeal, petitioners raised the point again. Def. Br. 42. The majority of the Seventh Circuit dismissed it as a "modest point," App. 68a, and yet recognized it as one of "five arguments relating to the process of removal and replacement," App. 24a.

Nor is it of any moment that petitioners themselves asked that some jurors be questioned. The district court is under a continuing obligation to ensure that a trial proceeds in a manner consistent with due process, and when the structural error arose — the jurors' fears of prosecution — petitioners objected and moved for a mistrial. Tr.24699, 24704; R.818.

Indeed, respondent's assertion that a structural error can be waived is itself subject to an ongoing debate. See Pet. 20 n.3; compare *United States* v. *Nelson*, 277 F.3d 164, 205 (2d Cir. 2002) and *United States* v. *Vasquez*, 271 F.3d 93, 100 (3d Cir. 2001), with *United States* v. *Recio*, 371 F.3d 1093, 1100 n.4, 1101, 1103 n.7 (9th Cir. 2004) and *United States* v. *David*, 83 F.3d 638, 647 (4th Cir. 1996).

2. Here, the jurors' fears of prosecution rendered the trial fundamentally flawed and deprived the defendants of their constitutional rights to a fair trial and an impartial jury. See App. 71a, 82a, 90a-91a (Kanne, J., dissenting); *id.* at 98a-99a (Posner J., dissenting). This Court has held that the right to an

unbiased fact-finder is a fundamental trial right that defies harmless error analysis. *Gomez* v. *United States*, 490 U.S. 858, 876 (1989). The government's attempt to immunize the jurors demonstrates, in Judge Posner's words, that "the proceedings were broken beyond repair." App. 99a.

Respondent nevertheless attempts to sidestep the structural error analysis by engaging in a discussion of actual prejudice and speculates that perhaps the jurors did not see the media reports urging their prosecution for perjury, Opp. 18, or did not appreciate the import of the government's offer of immunity, *ibid.*, or did not retain lawyers until after the verdict, *id.* at 18-19 n.2, or otherwise were not intimidated, *id.* at 17-18. But we do not know *any* of that. Federal Rule of Evidence 606(b) precludes the type of inquiry necessary to establish prejudice, namely, asking jurors how their fear of prosecution might have influenced their deliberations. Further, at the government's urging, the district court prohibited defense counsel from speaking with jurors after the verdict. 4/26/06 Tr.15.

Moreover, as Judge Kanne recognized, the district court's inability to enter definitive rulings and create a record on these critical jury decisions only exacerbated the difficulty of discerning prejudice. See App. 87a-88a (Kanne, J., dissenting) (deeming the district court "very conscientious but irresolute" and noting that the "record is at best inconclusive, and at the worst, nonexistent, on the district court's decisions on many of the critical issues in this case"). This Court has held that the inability to quantitatively assess or discern prejudice is a hallmark of structural error. *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 n.4 (2006) (resting "conclusion

of structural error upon the difficulty of assessing the effect of the error").

Finally, this Court's analysis of a fearful juror issue in *Remmer II* is consistent with structural error treatment. *Remmer* v. *United States*, 350 U.S. 377, 382 (1956). Significantly, *Remmer II* ordered a new trial based on an F.B.I. agent's questioning of a juror during trial, and did so even though the district court had found the questioning to be "harmless." *Id.* at 378. The F.B.I. questioning was such that, in the Court's objective opinion, the juror could not, "nor anyone else could say that he was not affected in his freedom of action as a juror." *Id.* at 381. The supposed prejudice discussion on which respondent relies consists of nothing more than an objective consideration of the agent's questioning and actually constitutes an explicit rejection of the analysis respondent offers here: "Proper concern for protecting and preserving the integrity of our jury system dictates against our speculating that the F.B.I. agent's interview with [the juror], whatever the Government may have understood its purpose to be, dispersed the cloud created by [the improper] communication." *Ibid.* That disposition — over the district court finding the error "harmless" and before this Court ever recognized certain errors as "structural" — is consistent with a finding of structural error here.

In short, respondent has cast no doubt on the need for this Court's review of the second question presented.

C. The "Cumulative Error" Question Is Squarely Presented, Is Subject To Conflicts In Authority, And Is Recurring And Important

Nor does respondent seriously dispute the importance of the third question presented, which relates to cumulative error.

1. Instead, respondent claims principally that petitioners "abandoned" their cumulative error argument. But that argument rings hollow. To the contrary, petitioners' appeal briefs are replete with the language of cumulative error from the statement of issues, Br.1-3, summary of argument, Br.17-19 ("an avalanche of errors . . . deprived Warner and Ryan of a fair trial before an impartial jury"), to the individual jury arguments themselves, arguing at length that prejudice had to be assessed in light of the totality of the circumstances, Br.27-29, 41, 42-43, 47-48; Reply Br.1, 5-6, 9-10, 14, 24. The phrase "[a]valanche of errors" is borrowed directly from Judge Posner's opinion in *United States* v. *Santos*, 201 F.3d 953, 965 (7th Cir. 2000) — a case that respondent acknowledges as a cumulative error case.

At bottom, respondent's argument is that petitioners "abandoned" the issue because they did not use the word "cumulative" in describing the myriad of jury and trial errors that combined to deny them a fair trial before an impartial jury. But this Court has recognized that preservation "does not demand the incantation of particular words," but requires only that the court be "fairly put on notice as to the substance of the issue." *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469 (2000).

2. Respondent attempts to characterize the circuit split on the constitutional necessity of cumulative error review as a question of what is "properly preserved and presented." Opp. 19-20. What respondent ignores is that the majority of circuits hold that cumulative error review is automatic because it is a required, implicit step in determining if a defendant received a fair trial. Pet. 22-23 (collecting cases).

Petitioners here raised eight issues on appeal, including a number of errors relating to pervasive jury misconduct and removal and substitution of deliberating jurors, and then argued that those errors denied them a fair trial. Respondent does not dispute that, in the vast majority of circuits, that would automatically warrant cumulative error review. But in the Sixth and now the Seventh Circuits, the errors raised on appeal will be considered only in isolation. Those decisions are in conflict, and the opposition does not even attempt to deny it.

3. Instead of addressing petitioners' discussion of the conflict, respondent argues that "only one jury error" occurred. Opp. 20. That contention is belied by the Seventh Circuit's opinion, which states that "the district court handled *most problems* that arose in an acceptable manner, and . . . whatever error remained was harmless." App. 3a (emphasis added). Indeed, the majority's refusal to conduct a cumulative error review suggests that there was more than "only one jury error," since in the Seventh Circuit, cumulative error analysis requires *multiple* errors. *United States* v. *Allen*, 269 F.3d 842, 847 (7th Cir. 2001). Further, respondent simply ignores petitioners' discussion of the circuit split on the question of whether the find-

ing of a "single" error precludes cumulative error analysis. Pet. 23-24 n.5.

In short, the circuits are squarely in conflict, both as to the necessity of cumulative error review in general, and as to the necessity for more than a "single error" to trigger such review.

* * * * *

The opposition merely confirms that each question presented would warrant this Court's attention even if this case did not involve the high-profile prosecution of a senior State official. But that fact also heightens the need for review, not only because of concerns about federal-state comity, but also because, given the publicity this case has generated, the errors committed below will likely be remembered, and have a greater influence on future criminal trials, than they otherwise would. For all these reasons, this Court's review is required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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